ORIGINAL

Supreme Court, U.S.
FILED
MAR 11 1992
OFFICE OF THE CLERK

No. 91-1305

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, Petitioner

v.

CARMEN GUEVARA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-1305

UNITED STATES OF AMERICA, Petitioner

v.

CARMEN GUEVARA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 941 F.2d 1299. The opinion dissenting from the denial of rehearing (Pet. App. 6a-10a) is reported at 949 F.2d 706.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1991. A petition for rehearing was denied on November 14, 1991 (Pet. App. 4a-5a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

Respondent Guevara adopts the government's statement of the facts but would add the following.

1. The government notes (Pet. at 5n.2) that the district court made an arithmetical error in calculating the offense level. However, the government did not raise this point in the district court.

2. Respondent objected to the Probation Officer's determination that the amount of the fraud was $103,250, a figure arrived at by arbitrarily treating all 295 immigration cases respondent handled as fraudulent, whereas in fact only 57 political asylum cases were fraudulent. Her fees in those 57 cases added up to $19,950. Although respondent requested an evidentiary hearing to determine the amount of the fraud this request was ignored by the district court (C.A. App. 38-40).

3. Respondent has already served most of her 28 month sentence of imprisonment. She has been transferred from FPC Alderson to the Pre-Release Center in Fairfax County, Virginia and will be released in August 1992. She was a model prisoner at FPC Alderson.

ARGUMENT

Respondent Carmen Guevara opposes the government's petition for a writ of certiorari. The result reached by the court of appeals is correct and it does not warrant review by this Court.

In ¶3 of the plea agreement, Guevara waived her right to appeal the sentence--a waiver exacted by the U.S. Attorney's Office for the Eastern District of Virginia as a condition of every plea agreement it enters into regardless of the difficulty or novelty of the sentencing issues presented by the case. Although such a waiver has been held to be valid, United States v. Wiggins, 905 F.2d 51 (4th Cir. 1990); United States v. Bolinger, 940 F.2d 478 (9th Cir. 1991), it frustrates the guidelines sentencing system created by Congress, which is premised on the availability of appellate review of sentences under the guidelines. Congress also thought it important to make appellate review of sentences equally available to the prosecution and the defendant for if only one side had the opportunity to appeal sentences this would skew the body of appellate case law. See Senate Report 98-225, 98th Congress, 1st Session (1983), at 150-51, reprinted in 1984 U.S. Code Cong. and Admin. News at 3182 et seq.

Since the United States drafted this plea agreement, it was incumbent upon the government to clearly reserve its own right to appeal the sentence if that is what it wanted to do. However, the government failed to explicitly reserve its own right to appeal the sentence.

In ¶4 of the plea agreement, the government "reserve[d] the right (1) to bring its version of the facts of this case to the Probation Office in connection with that office's preparation of a presentence report; (2) to dispute sentencing factors or facts material to sentencing in the presentence report; and (3) to seek resolution of such factors or facts in conference with opposing counsel and the United States Probation Office, as contemplated in this Court's Policy Regarding Procedures to be followed in Guidelines Sentencing." (Pet. App. 14a) Moreover, the government specifically reserved the right to file a pleading entitled "Position of the Parties with respect to Sentencing Factors." (id.).

Conspicuously absent from this list is any reservation of the government's right to appeal the sentence. The enumeration of these other reservations concerning its rights with respect to the sentencing process and the omission of any statement regarding its right to appeal the sentence fairly suggests that the government was not, in fact, reserving its right to appeal the sentence.

In any event, the plea agreement is at least ambiguous with respect to whether the government was reserving its right to appeal the sentence--an ambiguity the prosecutor could readily have avoided.[1] See United States v. Harvey, 791 F.2d 294, 301 (4th Cir.

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[1] The U. S. Attorney's Office has subsequently added language to its standard plea agreement to correct this omission. Thus, the decision in this case will have no effect on any one other than Guevara. We respectfully suggest that this case is not important enough to warrant review by this Court.

1986); United States v. Fields, 766 F.2d 1161, 1168-69 (7th Cir. 1985). The courts have long recognized that any ambiguity in a plea agreement must be resolved in favor of the defendant, not in favor of the government. In United States v. Harvey, 791 F.2d 294 (4th Cir. 1986), the Fourth Circuit observed that "both constitutional and supervisory concerns require holding the government to a greater degree of responsibility than the defendant...for imprecisions or ambiguities in plea agreements." Id. at 300. "This is particularly appropriate where, as will usually be the case, the government has proffered the terms or prepared a written agreement--for the same reasons that dictate that approach in interpreting private contracts." Id. at 301. Accord United States v. Jefferies, 908 F.2d 1520, 1523 (11th Cir. 1990); Innes v. Dalsheim, 864 F.2d 974, 979 (2d Cir. 1989), cert. denied, 110 S.Ct. 50 (1989); United States v. Packwood, 848 F.2d 1009, 1012 (9th Cir. 1988); United States v. Pelletier, 898 F.2d 297, 302 (2d Cir. 1990); In re Arnett, 804 F.2d 1200, 1202-04 (11th Cir. 1986); United States v. Fields, 766 F.2d 1161, 1168 (7th Cir. 1985)(government may not rely on favorable judicial construction to cure ambiguities in its plea agreement).

The interpretation of the plea agreement proffered by the government, i.e., that it reserved its right to appeal the sentence while forcing the defendant to waive her right to appeal, is certainly "one-sided," as the court of appeals said in its opinion. If the government expects the courts to honor and enforce such a one-sided plea agreement it had better make the terms of the

agreement clear to the defendant. There is no reason for this Court to resolve the ambiguity created by the prosecutor's poor drafting in favor of the government where the government's position is as unsympathetic as it is here.

Contrary to the government's petition, the court of appeals did not renegotiate Guevara's plea deal from the appellate bench. It merely declined to construe an ambiguous plea agreement in favor of the government. The case law collected above supports the lower court's interpretation of the plea agreement. The court below did not nullify the government's statutory right to appeal the sentence; the government forfeited that right by drafting an ambiguous plea agreement that failed to reserve its right to appeal the sentence in a situation where an explicit reservation was called for.

The government contends (Pet. at 13) that Guevara herself "did not construe the plea agreement as a waiver of the government's right to appeal," pointing to the fact that she did not advance such an argument to the court of appeals panel. However, her counsel's failure to raise the issue does not necessarily demonstrate that Guevara interpreted the plea agreement to reserve the government's right to appeal her sentence. To the contrary, Guevara maintains that she believed that both parties were agreeing to waive their right to appeal the sentence and that she was surprised when she learned that the government was appealing the sentence.

Even if this Court is inclined to review the case the most the government would be entitled to is a remand to the district court to hear evidence to determine respondent's understanding of the terms of the plea agreement. We have no doubt that the district court would conclude that respondent understood the plea agreement as containing a mutual waiver of the parties' right to appeal the sentence.

In interpreting the plea agreement the government must be held to the most "meticulous standards of both promise and performance," Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973); United States v. Fields, 766 F.2d 1161, 1167 (7th Cir. 1985). In this case the government calls upon this Court to allow it to appeal a sentence that has already been largely served; moreover, the government seeks to compel the district judge to apply the Draconian sentencing guidelines for money laundering to an offense that bears no resemblance at all to real money laundering and that should never have been charged as money laundering. Finally, the government asks this Court to intervene in a case where it inexcusably failed to draft the plea agreement in a manner that would clearly have reserved its right to appeal the sentence. We are mystified why the government sought a writ of certiorari in this insignificant case and we see no reason why the Court should grant it. In any event, the Court should not summarily reverse the judgment below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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